NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYED WAHIDUL ISLAM; MAHABUB ALAM BHUIYAN, Plaintiffs-Appellees, v. CREATIVE TOURS MICRONESIA, INC., Defendant-Appellant.	No. 92-16684 D.C. No. CV 91-0024 ARM **MEMORANDUM*** (Filed Sept. 2, 1994)

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, District Judge, Presiding

Argued and Submitted
November 4, 1993
Honolulu, Hawaii

Before: POOLE, WIGGINS and T.G. NELSON, Circuit Judges.

Creative Tours Micronesia, Inc. ("Creative Tours") appeals from the district court's judgment in favor of Syed Wahidul Islam and Mahabub Alam Bhuiyan on their claim for negligent entrustment. Islam and Bhuiyan were passengers in a Creative Tours automobile driven by an off-duty Creative Tours employee, Mohammed Nazrul

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Islim ("Ronnie"), and were seriously injured when the employee lost control of the car. We reverse.

I

We review the district court's findings of negligence under two separate standards. "[I]ssues of breach and proximate cause are questions of fact, reviewable for clear error." *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). However, "[t]he existence and extent of the standard of conduct are questions of law, reviewable *de novo*." *Id.*

In this diversity case, Commonwealth of the Northern Mariana Islands (CNMI) law governs. In the absence of CNMI case law or statutes, the common law as expressed in the Restatements, or to the extent not expressed, as understood in the United States, applies. 7 CMC § 3401. The CNMI Supreme Court recently issued its first and only published negligent entrustment decision, *Yoo v. Ouitugua*, No. 93-011 (May 12, 1994). This case is therefore governed by *Yoo* and the Restatements.

The parties agree that Ronnie Isl[i]m was an inexperienced, unlicensed driver with a prior accident history. They also agree that Creative Tours had no actual knowledge of this fact. Where they disagree is over whether Creative Tours ought to have known.

The District Court concluded that, prior to entrusting an employee with an automobile, Creative Tours had a duty to investigate his driving background. Creative Tours' primary contention on appeal is that under the Restatements, they owed no such duty. Sections 308 and

390 of the Restatement (Second) of Torts cover the principles of negligent entrustment:

> It is negligence to permit a third party to use a thing . . . which is under the control of the actor, *if the actor knows or should know* that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others

Restatement (Second) of Torts § 308 (1965) (emphasis added).

> One who supplies . . . a chattel for the use of another whom the supplier *knows or has reason to know* to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others . . . is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965) (emphasis added).

Yoo v. Ouitugua confirms what other state courts have unanimously concluded: § 308 and § 390 do not create an affirmative duty of inquiry. "In order to find [defendants] liable under section 390, Restatement of Torts, the trial court had to find that they knew or had reason to know of [the entrustee's] incompetence to drive . . . " *Yoo* at 7; *accord Mullins v. Harrell*, 490 So. 2d 1338, 1340 (Fla. App. 1986); *Abraham v. S.E. Onorato Garages, Inc.*, 446 P.2d 821, 825-26 (Haw. 1968); *Herbert v. Whittle*, 517 A.2d 358, 363 (Md. App. 1986); *McCarson v. Foreman*, 692 P.2d 537, 541-42 (N.M. App. 1984); *Moore v. Kiljander*, 604 P.2d 204, 206 (Wyo. 1979). Accordingly, under CNMI law, entrustors of chattels are under no initial, affirmative duty to

inquire into the competence of their entrustees. However, once an entrustor does know facts which would cause a reasonable person to inquire further, it may be liable for failing to do so.

The District Court concluded that "Creative Tours, prior to hiring an employee whose duties consisted primarily of driving to various locations to assist tourists, had a duty to inquire about the experience, driving record, and qualifications of the prospective employee." However, §§ 308 and 390 relate to the tort of negligent entrustment, not the tort of negligent hiring. Islam's complaint charged Creative Tours with negligently entrusting an automobile to Ronnie Islim, not with negligently hiring him, and his argument, both in the district court and on appeal, was based on negligent entrustment. Whatever Creative Tours' duty might have been in employing Islim, it had no affirmative duty of inquiry, in its role as owner of the Toyota Corolla, prior to entrusting the car to Islim.

The dissent misconstrues what is at issue here. It contends that "an employer's duty to inquire about qualifications must turn on the circumstances of, and the risks being created by, the employment." Dissent at 2. Perhaps so. But Creative Tours has been sued only as an owner, and under the clear rules of ownership liability, it cannot be held liable solely for failing to inquire into its entrustee's compentence.

Nothing in the majority disposition "shields an employer from liability" for "fail[ing] to inquire about an employee's license to drive." Dissent at 2. Employers may or may not be liable under theories not at issue here. We

simply apply to this car owner the same rule that applies to all other car owners. The dissent is conspicuously devoid of any authority to suggest that some other interpretation of §§ 308 and 390 actually applies when the entrustor is also an employer. The reason for this is simple: every other court to address the question has treated employer-entrustors just like any other entrustor. *See, e.g., Mullins,* 490 So. 2d at 1340 (finding no liability because "there is nothing in the record to suggest that defendant had any basis or suspicion to foresee that [the employee driver] was unreliable, dishonest, or incompetent in any way."); *Abraham,* 446 P.2d at 825-26; *Curley v. General Valet Serv., Inc.,* 311 A.2d 231, 237 (Md. App. 1973); *Burley v. Hudson,* 448 A.2d 375, 377 (N.H. 1982); *McCarson,* 692 P.2d at 541-42.

II

Islam and Bhuiyan contend that we can affirm in any event because the record contains sufficient evidence to support the District Court's finding that Creative Tours had reason to know of Ronnie Islim's incompetence. We have reviewed the record, and we cannot agree.

Appellees point to the following information known by defendant: 1) Ronnie did not display a driver's license and was not asked about one, 2) Ronnie did not own a car, 3) Ronnie was a citizen of Bangladesh, 4) Ronnie's application showed no jobs requiring driving, 5) Ronnie did not sign a written contract, as provided for by 3 CMC § 4434, and 6) Creative Tours was principally interested in the language skills of its employees.

This list is notable only for its utter unremarkableness. Nothing in the list offers any affirmative reason to suspect Ronnie could not drive competently. Ronnie never said he had no license, so absent a duty to inquire, his failure to proffer one is irrelevant. The inability to drive is surely only one of many reasons people don't own cars; for instance, an individual may not be able to afford one, or may not feel the need. Nor can one categorically assume that foreigners are incompetent drivers. *Cf. Johnson v. Casetta*, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961) (fact that car buyer couldn't speak English triggered no duty to inquire further). If having never held a position requiring on-the-job driving were grounds for suspicion, the majority of the work force would be suspect. Creative Tours' failure to have Ronnie sign a written contract was not something it "knew" which would lead it to suspect that Ronnie couldn't drive competently. Finally, Creative Tours' priorities in hiring have nothing to do with what facts they knew or had reason to know.

Creative Tours was under no affirmative duty to inquire into Ronnie Islam's competence before entrusting him with an automobile. Nor did they know of any facts which ought to have led them to inquire further. Therefore, they cannot be found liable for negligent entrustment. We reverse the judgment of the district court.

REVERSED.

Islam, et al., v. Creative Tours Micronesia, Inc., No. 92-16684

WIGGINS, J., dissenting.

I respectfully dissent.

I think it is possible to affirm the conclusion reached by the district court and policy concerns dictate that we should do so.

The majority correctly observes that our decision should be guided by *Yoo v. Ouitugua*, No. 93-011 (CNMI, May 12, 1994) and the Restatement (Second) of Torts. *Yoo* seeks the guidance of the Restatement and we should do so likewise. There are two sections of the Restatement that are implicated by this case: § 308 and § 390. Section 308 imposes liability upon the owner of a vehicle who permits a third party to use it if the owner "should know" of the third party's "likely" use of the car in a negligent manner. Section 390 similarly turns upon factual determinations. Liability is imposed on an owner "has reason to know" of the third party's likely negligence. The district court found liability here to exist. We have no special right to second-guess those factual determinations.

Nor can I agree on the legal issue. The Restatement does not direct an assessment of the reasonableness of the entrustment or employment based solely on the facts that happen to be exposed. Instead, it provides that a person sometimes may be expected to know certain facts. Surely one cannot know that an accident will occur. One may, however, be expected to take reasonable steps to lessen the risk of the accident. The scope of an employer's duty

to inquire about qualifications must turn on the circumstances of, and the risks being created by, the employment. I do not believe it is proper to announce a rule that shields an employer from liability because that employer was so irresponsible as to fail to inquire about an employee's license to drive when driving would clearly be within the scope of that employee's duties. *Yoo* does not compel such a result because it involved actual, not constructive, knowledge of the lack of a license.

Given the knowledge of the owner found by the district court to exist, Creative Tours should have inquired of the licensing status of their driver and it was negligent to not make such an inquiry.

I would affirm the judgment in favor of Islam.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

SYED WAHIDUL ISLAM and MAHABUB ALAM BHUIYAN, Plaintiffs, v. CREATIVE TOURS MICRONESIA, INC., Defendant.	Civil No. 91-0024 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Aug. 25, 1992)

THIS MATTER came before the Court on Monday and Tuesday, May 18 and 19, 1992 for trial, jury having been waived by stipulation in open court. The parties' proposed findings of fact and conclusions of law were filed on Tuesday, June 2, 1992. Plaintiffs were represented by Mr. Jay Sorensen. Defendant was represented by Mr. David W. Dooley of Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, with Ms. Marcia K. Schultz of that firm as local counsel pursuant to Local Rule 100-1(f). After considering the evidence adduced at trial and the briefs and memoranda filed by counsel, the Court hereby enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiffs Mr. Syed Wahidul Islam ("Islam") and Mr. Mahabub Alam Bhuiyan ("Bhuiyan") are citizens of Bangladesh.

2. Defendant Creative Tours Micronesia, Inc. ("Creative Tours") is a corporation organized in the Territory of Guam under Guam law, doing business in Guam and in Saipan, Commonwealth of the Northern Mariana Islands (CNMI). Creative Tours is in the business of organizing and conducting tour groups from Japan to Guam and Saipan.

3. Creative Tours had some vehicles that were used by the personnel in its airport division for their transportation to other hotels, where they would assist tourists to check out, board a bus and go to the airport for departures and arrivals. Among the vehicles was a 1990 White Toyota Corolla, leased by and under the control of Creative Tours.

4. The vehicles were routinely parked outside the Nikko Hotel, where Creative Tours' main Saipan office was located. The keys were kept in an unsecured file drawer, which was available to all the employees. Because their operations were at all hours of the day and night, the keys and vehicles were available at all hours. Creative Tours had a policy, not promulgated in writing, that employees were to use the vehicles for business purposes only. There was no system to check out the keys or vehicles nor any record kept of vehicle use.

5. On January 8, 1991, Creative Tours hired Mr. Mohammed Nazrul Islim, known as "Ronnie", to be a part of their airport division. His duties were to meet Creative Tours' tour groups to assist with baggage and check-in at the airport and at the several hotels in Saipan where the tourists stayed.

6. Ronnie was hired by Creative Tours' general manager of the Saipan office, Mr. Kintaro Nezu ("Nezu"). Nezu knew that Ronnie had lived in the CNMI for approximately four years and had been recommended to Creative Tours by his brother, who was employed by a competing tour agency.

7. Nezu saw Ronnie driving Ronnie's brother's car before he was hired, and knew that Ronnie had no car of his own.

8. At the time Nezu hired Ronnie, Nezu explained to Ronnie that he would be required to operate a motor vehicle in order to perform his job.

9. Neither Nezu nor anyone for Creative Tours ever asked Ronnie or otherwise determined if he had a driver's license.

10. Ronnie never mentioned that he did not have a CNMI driver's license.

11. Ronnie was never issued a driver's license while in the CNMI.

12. Neither Nezu nor anyone asked or otherwise determined anything about Ronnie's driving experience or qualifications.

13. Ronnie had only limited driving experience before he was hired by Creative Tours. Since he arrived in the CNMI in 1986, his jobs were as a stevedore and security guard, neither of which required him to drive.

14. In August, 1989, Ronnie took a car which had been leased by a friend of his without permission and was involved in a two-car collision. That collision

resulted in a lawsuit against Ronnie and others, wherein he was charged with negligence in causing the collision and insurance coverage was denied on the grounds of Ronnie not having a driver's license. That action was on file and pending against Ronnie in this Court when Ronnie was hired by Creative Tours.

15. During the approximately two months Ronnie worked for Creative Tours, Creative Tours received no complaints about Ronnie's driving, work performance, or use of alcohol, nor observed incompetent driving by Ronnie.

16. On March 15, 1991, plaintiffs attended a birthday party at the barracks where Islam then lived, located next to the garment factory where he worked. At the party there was eating, drinking and dancing. Plaintiffs each had two or three beers during the party and ate dinner.

17. Ronnie came to the party about 7:30 p.m. He drove Creative Tours' Corolla to the barracks where the party was. He ate and talked to friends. He drank beer and whiskey.

18. At about 11:30 p.m., plaintiffs, Ronnie and others left the room where the party was and went out to the area in front of the garment factory where the employees often sat and spent time and where the cars were parked. They stayed there and talked for over an hour before leaving. There was no drinking during that time.

19. Plaintiffs had the opportunity to see Ronnie walk and hear him talk. Ronnie did not appear to display signs of being intoxicated.

20. Ronnie offered Bhuiyan a ride home. He also invited Islam for a ride along with three Koreans who also worked at the garment factory. They got in the Corolla. Four men were in the back, with the two plaintiffs in the center of the back seat. Ronnie was driving and the other Korean was in the front passenger seat.

21. Ronnie drove the car down the hill without incident to the intersection with Middle Road. Ronnie turned left at the intersection. Islam asked him why, knowing it was the wrong direction to take Bhuiyan home. Ronnie then began accelerating, driving fast, passing two or three cars, exceeding the speed limit and making unsafe lane changes. Islam told Ronnie he should show down, but Ronnie ignored him. After driving a mile or two, Ronnie lost control of the Corolla, and went off the road.

22. Ronnie was negligent in operating the Corolla in the early morning of March 16, 1991.

23. The conduct of neither plaintiff regarding the protection of their own safety, fell below the standard of a reasonable person under like circumstances.

24. As a proximate result of Ronnie's negligence plaintiffs were injured.

25. Bhuiyan suffered a displaced, bayonet fracture of the right clavicle, minor fractures of the left clavicle and right pelvis, and a contusion to the head. The major fracture was considered fused by the treating orthopedic

surgeon on July 17, 1991. He continues to have complaints of pain in the right shoulder when raising his right arm. This should heal without any permanent injury.

26. Islam suffered a subluxation of the C3-C4 vertebrae. After two months of conservative treatment, the treating orthopedic surgeon recommended surgery, which was done on May 15, 1991. The C2-C3-C4 vertebra were wired together and bone from plaintiff's right hip was used to fuse the vertebral joints together.

27. Islam has a permanent disability, which at the time of trial is still resolving. He has a limitation of the range of motion in extension and flexion of his neck. He will be unable to do some physical activities for the rest of his life, including running and lifting heavy objects. The inflexibility of the three vertebra and two joints will put greater stress on the adjoining joints and will significantly increase the risk of arthritis later in life.

28. Either during the auto collision or the subsequent surgery, Islam experienced a neuroma, a severed and displaced nerve ending, causing pain which at the time of trial was still resolving. This is expected to completely resolve itself.

29. Bhuiyan incurred medical expenses in the amount of $165.00.

30. Islam incurred medical expenses in the amount of $1,687.00.

31. As a proximate result of his injuries, Bhuiyan lost time from work as a security guard and lost income in the amount of $1,133.44.

32. As a proximate result of his injures, Islam lost time from work as a security guard, which to the time of trial, amounted to $5,626.00 in lost income.

33. In the trial of this matter, Creative Tours vigorously opposed liability, but agreed on the record that the damages prayed for were reasonable.

34. Bhuiyan suffered general damages in the amount of $30,000.00.

35. Islam suffered general damages and loss of future income in an amount of $200,000.00.

II. CONCLUSIONS OF LAW

The following conclusions of law, insofar as they may be considered findings of fact, are so found by this Court to be true in all respects.

1. Jurisdiction by diversity of alienage exists under 48 U.S.C. § 1694a(a) (1988) and 28 U.S.C. § 1332(a)(2), (d) (1988).

2. When sitting in diversity a federal court applies substantive state law as its rules of decision. 28 U.S.C. § 1652 (1988). The relationship between the federal courts and those of the CNMI is the same as that between the federal and state courts. 48 U.S.C. § 1694c(a) (1988).

3. Absent CNMI statute, CNMI case law, or local customary law, the rules of the common law as expressed in the restatements of the law approved by the American Law Institute are the rules of decision when applying CNMI law. 7 Commonwealth Code (CMC) § 3401 (1984).

4. The Restatement (Second) of Torts (1965) provides:

> **Section 308.** *Permitting Improper Persons to Use Things or Engage in Activities.*
>
> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

> **Section 390.** *Chattel for Use by Person Known to be Incompetent.*
>
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

5. The rule in Restatement (Second) of Torts § 390 (1965) is a special application of the rule stated in Restatement (Second) of Torts § 308 (1965). Restatement (Second) of Torts § 390 Comment b (1965).

6. Creative Tours entrusted the vehicles under its control, including the 1990 White Toyota Corolla involved in this case, to its employee, Ronnie, during the approximately two month period of his employment.

7. Creative Tours, prior to hiring an employee whose duties consisted primarily of driving to various locations to assist tourists, had a duty to inquire about the experience, driving record, and qualifications of the prospective employee.

8. Creative Tours breached its duty by failing to inquire of Ronnie or anyone else about Ronnie's driver's license, accident record, or other driving experience, driving record, and qualifications.

9. Creative Tours should have known that Ronnie was likely to use its vehicles or conduct himself in the activity of driving in such a manner as to create an unreasonable risk of harm to others. Restatement (Second) of Torts § 308 (1965).

10. More specifically, Creative Tours had reason to know that Ronnie, because of his inexperience, his driving record and his lack of qualifications as a driver, would use its vehicles in a manner involving unreasonable risk of physical harm to himself and others whom Creative Tours should have expected to share in or have been endangered by their use. Restatement (Second) of Torts § 390 (1965).

11. As a proximate result of the negligent entrustment by Creative Tours, plaintiffs were injured, incurred medical expenses, loss of income and general damages.

12. Neither plaintiff was contributorily negligent.

III. CONCLUSION

Judgment shall enter for plaintiffs as indicated above.

IT IS SO ORDERED.

DATED this 25th day of August, 1992.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

SYED WAHIDUL ISLAM and MAHABUB ALAM BHUIYAN, Plaintiffs, v. CREATIVE TOURS MICRONESIA, INC., Defendant.	Civil No. 92-0024 JUDGMENT (Filed Aug. 25, 1992)

THIS MATTER came before the Court on Monday and Tuesday, May 18 and 19, 1992 for trial, Honorable Alex R. Munson, District Judge, presiding, jury having been waived by stipulation in open court. The issues have been duly tried and the Court's "Findings of Fact and Conclusions of Law" has been duly rendered and is being filed concurrently. Pursuant to Fed.R.Civ.P. 58 and Fed.R.Civ.P. Form 32, judgment is entered against Defendant in favor of Plaintiffs as follows:

1. Plaintiff Mr. Mahabub Alam Bhuiyan is awarded reimbursement for medical expenses in the amount of $165.00; reimbursement for lost income in the amount of $1,133.44; and reimbursement for general damages in the amount of $30,000.00, totalling $31, 298.44, plus his costs of action.

2. Plaintiff Mr. Syed Wahidul Islam is awarded reimbursement for medical expenses in the amount of $1,687.00; reimbursement for lost income in the amount of $5,626.00; and reimbursement for general damages in

the amount of $200,000.00, totalling $207,313.00, plus his costs of action.

3. Post-judgment interest is allowed as required by and as set forth in 28 U.S.C. § 1961(a) (1988).

IT IS SO ORDERED AND ADJUDGED.

DATED this 25th day of August, 1992.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

Costs are hereby taxed in the following amount as stipulated by the parties on September 24, 1992 and included in the judgment: $1,228.20

Dated this 24th day of September 1992.

/s/ Galo L. Perez,
Galo L. Perez, Clerk of Court

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYED WAHIDUL ISLAM AND MAHABUB ALAM BHUIYAN Plaintiff-Appellees, v. CREATIVE TOURS MICRONESIA, INC., Defendant-Appellant.	No. 92-16684 DC No. 91-0024 **ORDER** (Filed Feb. 23, 1995)

Before: POOLE, WIGGINS, and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS

SYED WAHIDUL ISLAM and MAHABUB ALAM BHUIYAN, Plaintiffs, v. CREATIVE TOURS MICRONESIA, INC., Defendant.	CIVIL CASE NO. CV 91-0024 COMPLAINT (Filed July 9, 1991)

Plaintiffs allege:

1. Jurisdiction of this matter is vested in this court pursuant to 28 U.S.C. §1332(a)(2) and 48 U.S.C. §1694A(a).

2. Plaintiffs are citizens of Bangladesh.

3. Defendant is a corporation organized and existing under the laws of the Territory of Guam, doing business in Saipan, Northern Mariana Islands.

4. On or about March 16, 1991, during the early morning hours, plaintiffs were passengers in an automobile described as a 1990 Toyota Corolla, license number AAZ-001, which was being operated by one Mohammed Nazrul Islim, as it was being driven in a southerly direction on W-2 highway in Garapan, Saipan, N.M.I.

5. As a proximate result of the negligence of said operator of the aforementioned 1990 Toyota Corolla, it collided with cars parked off the roadway.

6. At all relevant times, the aforementioned 1990 Toyota Corolla was under lease to and in the control of defendant.

7. At all relevant times, Mohammed Nazrul Islim was employed by defendant.

8. At all relevant times, Mohammed Nazrul Islim was in the course and scope of his employment with defendant.

9. Defendant negligently entrusted the 1990 Toyota Corolla to the operator, Mohammed Nazrul Islim.

10. As a proximate result of the negligence of defendant, plaintiffs suffered serious bodily injury, incurred medical costs and expenses, lost income and were injured in their health, strength and activity, all in an amount according to proof at the time of trial.

11. Plaintiffs' damages exceed the sum or value of $50,000, exclusive of interest and costs.

WHEREFORE, Plaintiffs pray for judgment awarding them:

1. Damages according to proof;

2. Costs of suit;

3. Such other and further relief as the court may deem proper.

/s/ Jay H. Sorensen
JAY H. SORENSEN
Attorney for Plaintiffs

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS

JUNG KEON YOO, Plaintiff/Appellee, vs. NICOLASA QUITUGUA, JEFFREY QUITUGUA, a Minor,	)	APPEAL NO. 93-011 CIVIL ACTION NO. 90-722 OPINION (Filed May 12, 1994)

Submitted on the Briefs February 11, 1994

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BEFORE: DELA CRUZ, Chief Justice, VILLAGOMEZ, Justice, and BELLAS, Special Judge.

Dela Cruz, Chief Justice:

This is a personal injury action arising from an automobile accident. Judgment in the amount of $66,105 plus costs was entered against Jeffrey Quitugua, a minor, and his parents Nicolasa and Daniel Quitugua. Mrs. Quitugua and Jeffrey appeal the trial court's finding of parental liability based on negligent entrustment of the family

truck to Jeffrey, and unlicensed minor.[1] Because the facts of this case support a finding of liability based on negligent entrustment, we affirm the judgment below.

I.

On the evening of October 1, 1989, while driving his parents' truck, Jeffrey collided with the plaintiff Jung Keon Yoo's sedan. Mr. Yoo suffered serious and permanent bodily injuries. The collision occurred after a high speed chase of Jeffrey by the police. Jeffrey was intoxicated.

At the time of the accident, Jeffrey was only 16 years old. He did not have a driver's license, and his mother knew he had no license to drive. The trial court found that Jeffrey's parents had allowed him to use the truck "many" times prior to the accident, despite their knowledge that he did not have a license to drive. (Findings of Fact and Conclusions of Law, Jan. 4, 1993, "Order" Findings of Fact Nos. 14 & 15.)

In finding liability based on negligent entrustment, the court stated: "Nicolasa and Daniel Quitugua had reason to know because of Jeffrey's youth, inexperience, his lack of [a] driving record and his lack of qualifications as a driver, [that he] would use the Toyota pickup truck in a manner involving unreasonable risk of physical harm to himself and others whom defendant parents should have expected to share in or have been endanger[ed] by his use." (Order, Conclusions of Law, No. 8.)

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[1] Mr. Quitugua does not appeal.

II.

Mrs. Quitugua raises two issues for our review.

The first issue is her contention that 6 CMC §§ 5201-5202 absolves parental liability for the delinquent acts of a minor, including the car accident at issue. She argues that the trial court erred in applying the theory of negligent entrustment found in the Restatement (Second) of Torts in view of 6 CMC §§ 5201-5202 which precludes parental liability here.

The issue of whether a particular law applies or not is a legal question. Therefore, our review is *de novo*. *Sonoda v. Villagomez*, No. 92-034 (N.M.I. Sept. 15, 1993).

The second issue, assuming the theory of negligent entrustment applies, challenges the ultimate finding of parental liability based on negligent entrustment. This issue essentially questions the sufficiency of the evidence supporting liability based on negligent entrustment and thus, the trial court's findings of fact. Our review of this issue, therefore, is for clear error. *Apatang v. Mundo*, No. 92-025 (N.M.I. Feb. 22, 1994).

III.

A. The Applicability of the Juvenile Delinquency Statute.

Mrs. Quitugua argues that 6 CMC §§ 5201-5202[2] apply to this case and precludes parental liability here. She contends that, in view of this statute, the trial court

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[2] 6 CMC § 5201-5202 (Supp. May 1986) reads:

§ 5201. Authority of Parent Over Child.

A parent or guardian having custody of a child is charged with the control of the child and has the power to exercise parental control and authority over the child.

§ 5202. Liability of Parent or Guardian.

(a) In any case where a child is found delinquent and placed on probation, if the Court finds at the hearing that the parent or guardian having custody of the child has failed or neglected to subject the child to reasonable parental control and authority, and that the failure or neglect is the proximate cause of the act or acts of the child upon which the finding of delinquency is based, the Court may require the parent to enter into a recognizance with sufficient surety, in an amount of not more than $100, conditioned upon the faithful discharge of the conditions of probation of the child.

(b) If the child thereafter commits a second act and is for that reason found delinquent, or violates the conditions of probation, and the Court finds at the hearing that the failure or neglect of the parent to subject the child to reasonable parental control and authority or to faithfully discharge the conditions of probation of the child on the part of the parent is the proximate cause of the act or acts of the child upon which the second finding of delinquency is based, or upon which the child is found to have violated the conditions of probation, the Court may declare that all or a part of the recognizance shall be applied in payment of any damages; otherwise, the proceeds therefrom, or any part remaining after the payment of damages as aforesaid, shall be paid into the Commonwealth general fund.

erred in applying the common law theory of negligent entrustment set forth in the Restatement (Second) of Torts. 7 CMC § 3401. We reject this argument as frivolous.

Sections 5201 and 5202 relate to parental liability for the *delinquent* acts of a juvenile placed on probation. The case before us is a civil action asserting liability of any actor (not necessarily a parent) for negligent entrustment. Just as the criminal laws do not preclude an injured party from seeking civil damages for harm suffered as a result of criminal conduct, a party is not precluded from seeking damages from a minor and his parents for damages suffered at the hands of that minor. Therefore, we reject the argument that the juvenile delinquency statute set forth in 6 CMC § 52-1-5202 is a "written law" which precludes the application of the Restatement provision on negligent entrustment.

B. The Issue of Negligent Entrustment.

The second issue is whether the trial court's finding of parental liability based on negligent entrustment constituted error. Mrs. Quitugua argues that there was no evidence to support a finding that Jeffrey was incompetent to drive. She asserts that Jeffrey was (1) not an inexperienced driver, (2) not physically or mentally handicapped, (3) old enough to drive even though not licensed, and (4) not intoxicated at the time he took the truck. Further, there was no evidence that Mr. and Mrs. Quitugua knew Jeffrey was likely to become intoxicated or under the influence of drugs on the night of the accident. Finally, she contends that there was no evidence

that Jeffrey was habitually reckless or has a violent nature or disposition.

Because the Commonwealth has no written law on the question pertaining to parental civil liability for the negligent act of a minor, the trial court applied the Restatement (Second) of Torts principle pertaining to negligent entrustment. 7 CMC § 3401.

Restatement (Second) Torts, section 390, provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) Torts § 390.[3]

The important question we need to answer is whether Jeffrey was competent to drive his parents'

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[3] Restatement (Second) Torts, section 390 is a special application of section 308. Restatement (Second) of Torts § 390 cmt. b. Section 308 provides:

> It is negligence to permit a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) Torts § 308.

truck. We turn to the Commonwealth traffic laws regarding the licensing of persons operating motor vehicles on public highways.

Our traffic laws provide that no person may operate any motor vehicle in the Commonwealth "unless that person has been licensed as an operator under this division." 9 CMC § 2201. The Code also requires an examination of each driving applicant for eyesight, ability to read and understand traffic-control devices, knowledge of safe driving practices and of CNMI traffic laws, and an actual demonstration of the applicant's ability to operate a motor vehicle. 9 CMC § 2207. It notes that persons under the age of 16 are "unqualified" to hold an operator's permit. 9 CMC § 2203(a).

Our law requires that only persons who are competent to drive are licensed an allowed to drive on our public roadways. Because an automobile is a dangerous instrumentality in the hands of inexperienced, youthful, and unqualified drivers, such traffic laws are necessary for the safety of the public and must be strictly enforced. This is why the Commonwealth requires testing before licensing.

Other jurisdictions agree:

> The whole purpose of requiring drivers to possess licenses is to protect the public against the risks of permitting incompetent or inexperienced drivers to operate vehicles on the public thoroughfares.

Roland v. Golden Bay Chevrolet, 207 Cal.Rptr. 2413, 418 (Cal.Ct. App. 1984), *hr'g granted and dismissed as moot*, 217 Cal.Rptr. 415 (1985).

> Licensing is a means by which the state may determine whether vehicle operators have acquired a minimal standard of competence.

City of Spokane v. Port, 716 P.2d 945, 947 (Wash. Ct. App. 1986), *review denied*, 106 Wash.2d 1010 (1986).

One state jurisdiction has held that its state licensing laws constitute a declaration that minors under the licensing age are incompetent drivers who do not possess sufficient care and judgment to safely operate a motor vehicle on the highway. *Sedlacek v. Ahrens*, 530 P.2d 424, 426 (Mont. 1974). *See also Vince v. Wilson*, 561 A.2d 103 (Vt. 1989). In the case before us, the trial court concluded that Jeffrey's youth, lack of a license and inexperience as a qualified driver proximately caused the accident. We find no error with this finding.

In order to find Mr. and Mrs. Quitugua liable under section 390, Restatement of Torts, the trial court had to find that they knew or had reason to know of Jeffrey's incompetence to drive and that this incompetence was a proximate cause of the accident with Yoo. Although Mrs. Quitugua argues differently, the evidence supports the trial court's factual findings and conclusions.

Mrs. Quitugua testified that she knew Jeffrey did not have a driver's license and that she was "just taking a chance that [Jeffrey] might know how to drive." (Trial transcript "Tr." 148:9-11; 152:16-18.) She also testified that she gave Jeffrey permission to use the truck to run errands, knowing that he had no license to drive. (Tr. 146:4-13; 155:16-23; 57:20-58:3; 73:20-74:4; 79:12-80:7.) She was aware of Jeffrey's frequent use of the truck and tacitly approved it. Despite this knowledge, she and her

husband allowed him to use the car risking the possibility of an accident.

The trial court's conclusion that the Quituguas permitted Jeffrey to use the truck on the night of the accident knowing that he was unlicensed was correct. Implied permission may be deduced from the course of conduct and relationship between Jeffrey and his parents. *See Derusha v. Iowa Natl' Mut. Ins. Co,* 181 N.W. 2d 481, 485 (Wis. 1970); *See also Jones v. Fleischhacker,* 325 N.W.2d 633, 640 (Minn 1982). The evidence shows that the Quituguas had allowed Jeffrey to use the truck whenever Jeffrey decided to do so, including the night of the accident. Although there was no express permission, based on Jeffrey's unrestricted use of the truck, there was evidence of implied permission to do so. For example, Jeffrey testified that his sister Agnes taught him how to drive the family car in their driveway even though he was unlicensed. (Tr. 53:23-55:21.) Also, Jeffrey's friends testified that Jeffrey drove them to and from school and on weekends.[4] (ER 3 and ER 4.)

The trial court's conclusion that there is parental liability based on negligent entrustment is adequately supported by evidence of Mrs. Quitugua's actual knowledge that Jeffrey had no license to drive and implied permission given to Jeffrey to use the truck. The standard of review we apply is for clear error. Unless we are "convinced that a mistake" has been made in regard to

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[4] While this evidence was introduced apparently to show that he could drive, it fails to overcome the fact that he had no license to drive, was an inexperienced driver and should not have been driving on the night of the accident.

the trial court's factual findings, we must affirm. *Apatang v. Mundo*, No. 92-025 (N.M.I. Feb. 22, 1994). The factual findings upon which the court based its conclusion that there was negligent entrustment was not clearly erroneous. Had Jeffrey been licensed, he would have had the legal basis to drive and to operate his parents' truck.

We need not address the question of whether Mr. and Mrs. Quitugua are also liable for the negligent entrustment of the truck to Jeffrey because Jeffrey was intoxicated at the time of the accident. If, at the time of the accident, they knew that Jeffrey habitually consumed alcohol to the point of inebriation and took no precautionary measure to prevent Jeffrey from driving the truck, then these alleged facts would have been an additional basis of liability for negligent entrustment. Here, however, the evidence appears insufficient to establish these allegations. At most, the finding that Jeffrey was under the influence of alcohol at the time of the accident merely supports the trial court's conclusion that Jeffrey was not only an inexperienced driver, but an irresponsible one as well.

We therefore AFFIRM the Judgment of the trial court.

Dated at Saipan, MP, this 12th day of May, 1994.

/s/ Jose S. Dela Cruz
JOSE S. DELA CRUZ,
Chief Justice

/s/ Ramon G. Villagomez
RAMON G. VILLAGOMEZ,
Associate Justice

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS,
Special Judge